

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>BRADLY W. SMITH</b>	)	
Claimant	)	
V.	)	Docket Nos. 1,071,549;
	)	1,071,550 & 1,071,551
<b>CITY OF LAWRENCE</b>	)	
Self-Insured Respondent	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent appealed the September 28, 2015, Order for Medical Treatment entered by Special Administrative Law Judge (SALJ) Jerry Shelor. Sally G. Kelsey of Lawrence, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the SALJ and consists of the transcript of the August 11, 2015, preliminary hearing and exhibits thereto; the September 18, 2015, independent medical examination report by Dr. Harold A. Hess; and all pleadings contained in the administrative file.

**ISSUE**

Does K.S.A. 2014 Supp. 44-534a(a) require a preliminary hearing to be held before the September 28, 2015, Order for Medical Treatment was issued?

**FINDINGS OF FACT**

These claims came on for preliminary hearing on August 11, 2015, before ALJ Brad E. Avery. At the beginning of the preliminary hearing, ALJ Avery stated, "We are here for preliminary hearing purposes."<sup>1</sup> He admitted claimant's two exhibits and a single exhibit of respondent. No witnesses testified and the entire preliminary hearing transcript consists of seven pages. The following discourse also took place:

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<sup>1</sup> P.H. Trans. at 4.

JUDGE AVERY: . . . The claimant is here to request additional treatment. The court is going to order an independent medical examination to determine what, if any, additional treatment is necessary to cure and relieve the affects of the date of accident. And I will get an order to that effect to you shortly. Anything else?

MR. KUBIN: Judge, I would like Exhibit A to be made part of the record today then.<sup>2</sup>

Other than the aforementioned exhibits, the parties did not request any evidence be placed in the record. Nor did the parties object to the ALJ issuing an order appointing Dr. Hess to independently evaluate claimant.

On August 12, 2015, ALJ Avery issued an Order Referring Claimant for Independent Medical Evaluation by Dr. Hess. The evaluation was completed on September 18, 2015. Dr. Hess opined claimant's 2012, 2013 and 2014 work injuries were the prevailing factors causing his medical condition and current symptoms. Dr. Hess recommended claimant undergo an MRI.

On September 28, 2015, SALJ Shelor issued an order stating:

Now on this 11th day of August, 2015, the claimant's Application for Preliminary Hearing comes on for hearing before the Administrative Law Judge for the Division of Workers Compensation of the State of Kansas. After hearing the evidence and arguments of counsel, it is found that:

**Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier** with Dr. Harold Hess until further order or until certified as having reached maximum medical improvement.<sup>3</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

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<sup>2</sup> *Id.* at 4-5.

<sup>3</sup> SALJ Order for Medical Treatment (Sept. 28, 2015) at 1.

Respondent asserts the September 28, 2015, order directing medical treatment was issued without giving it an opportunity to present evidence at a preliminary hearing. In his brief, claimant stated:

While the Court typically issues Orders after receiving IME[s] from Court-Ordered physicians, it is typical that the IME be followed by a Hearing if the Order is not preceded by an Evidentiary Hearing or sufficient stipulations. Judge Shelor's Order for medical treatment was likely an oversight based on a presumption that the IME Order was preceded by a prior hearing or entry of stipulations, meeting all of the other necessary elements of proof. While Claimant believes that he could easily prove such elements, since there was no compensability stipulations, Claimant agrees that the matter should be remanded to the Administrative Law Judge for a Preliminary Hearing at this time.<sup>4</sup>

This Board Member concurs with the parties. K.S.A. 2014 Supp. 44-534a(a)(2) provides that where there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. The Board has consistently required a hearing to be held on a contested matter before an order may be entered. In *Scroggin*,<sup>5</sup> the ALJ, without a hearing, ordered an attorney to pay court reporter costs and fees. The Board remanded the matter to the ALJ with instructions to conduct a hearing. In *Stewart*,<sup>6</sup> the Board vacated an order for attorney fees because no hearing was held prior to the issuance of the order.

This review has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, the undersigned Board Member vacates the September 28, 2015, Order for Medical Treatment entered by SALJ Shelor and remands this matter to the SALJ with instructions to conduct a preliminary hearing and issue an Order on claimant's request for medical treatment.

**IT IS SO ORDERED.**

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<sup>4</sup> Claimant's Brief at 1.

<sup>5</sup> *Scroggin v. Heartland Park Raceway, LLC*, No. 1,051,858, 2013 WL 1384385 (Kan. WCAB Mar. 18, 2013).

<sup>6</sup> *Stewart v. Access Control Solutions, LLC*, No. 1,064,743, 2014 WL 4976740 (Kan. WCAB Sept. 29, 2014).

<sup>7</sup> K.S.A. 2014 Supp. 44-555c(j).

Dated this \_\_\_\_ day of October, 2015.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Jerry Shelor, Special Administrative Law Judge

Steven M. Roth, Administrative Law Judge